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No. 71-1066

In the Supreme Court of the United States

OCTOBER TERM, 1971

LEWIS L. COLASURDO, MICHAEL J. MCLANEY, ANTHONY CIPO AND EVERETT A. WHORL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

American Communications Assn. v. Douds, 339 U.S. 382	8
Bain, Ex Parte, 121 U.S. 1	6
Boyce Motor Lines v. *United States*, 342 U.S. 337	8
Costello v. United States, 350 U.S. 359	9
Gaither v. *United States*, 413 F. 2d 1061	7
Gruenwald v. *United States*, 353 U.S. 391	2, 7, 8
Ingram v. *United States*, 360 U.S. 672	8
Lawn v. *United States*, 335 U.S. 339	9
New England Enterprises, Inc. v. *United States*, 400 F. 2d 58; certiorari denied, 393 U.S. 1036	7
Overstreet v. *United States*, 321 F. 2d 459, certiorari denied, 376 U.S. 459	7
Salinger v. *United States*, 272 U.S. 524	6, 7
Stewart v. *United States*, 12 F. 2d 524	7
United States v. *Blue*, 384 U.S. 251	9–10
United States v. *Ragen*, 314 U.S. 513	8, 9

462-345—72

Statutes:

	Page
15 U.S.C. 78m	2
15 U.S.C. 78ff(a)	2, 8
18 U.S. 371	2

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OPINION BELOW

The opinion of the court of appeals is reported at 453 F. 2d 585.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1971. A petition for rehearing was denied on January 20, 1972. The petition for a writ of certiorari was filed on February 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the action of the trial judge in withdrawing from the jury's consideration certain purposes

charged in the conspiracy count violated petitioners' right to be tried on the indictment returned by the grand jury.

2. Whether under the decision of this Court in *Grunewald* v. *United States*, 353 U.S. 391, the evidence was legally sufficient to sustain the conviction on the conspiracy count.

3. Whether a defendant charged with willfully and knowingly filing a materially false and misleading report may avoid conviction on due process grounds simply because he had to exercise some judgment in determining whether the inclusion of particular facts was material to the accuracy of the report.

4. Whether the trial judge was required to conduct a pre-trial hearing to determine the competency and adequacy of evidence before the grand jury which indicted petitioners.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to defraud the Securities & Exchange Commission and to commit certain offenses against the United States in violation of 18 U.S.C. 371. Petitioner Colasurdo was also convicted on four substantive counts of filing false statements with the S.E.C. and the New York Stock Exchange, in violation of 15 U.S.C. 78m and 78ff(a). Petitioner Whorl was convicted on two of those counts. Colasurdo was sentenced to two years' imprisonment on the conspiracy count and one year on each of the substantive counts, the sentences to run concurrently, and was fined an aggregate of $50,000. Whorl was sen-

tenced to one year's imprisonment on the conspiracy count and was fined an aggregate of $30,000. Petitioners Cipo and McLaney were each fined $10,000 and McLaney received a one-year suspended sentence.

The opinion of the court of appeals sets out in detail the complicated scheme whereby petitioners acquired control of the Crescent Corporation, a publicly held corporation, using the very assets of Crescent to accomplish the feat. In so doing, petitioners engaged in a series of transactions the sham nature of which was illegally concealed from the SEC. The substance of these transactions was as follows.

In 1965, Colasurdo was president of Pakco Companies, Inc., and with his two brothers owned 42% of its corporate stock. Pakco owned a 2,500 acre tract in New Jersey devoted to raising blueberries. This asset was carried on the corporate books at a value of one dollar. On May 19, 1965, Pakco authorized sale of the tract to one Meyers or his nominee for $3,850,000, payment to be $500,000 by December 1, 1965, the balance in five equal annual installments thereafter. The only security given for the note was the guarantee of petitioner McLaney (Pet. App. A, 3a–4a). This agreement was executed on May 31, 1965, title being taken by McLaney in the name of Caletta Blueberry Company. On August 31, 1965, Caletta sold the tract to Makepeace, Inc., a corporation owned by petitioner Cipo, for $3,900,000. This was to be paid by $500,000 one day before the Meyers-McLaney payment to Pakco and the balance in five equal annual installments payable three months before and in an amount

$10,000 greater than the Meyers-McLaney payments to Pakco. The deeds from Pakco to Caletta and from Caletta to Makepeace were both recorded on September 23, 1965.[1] Petitioner Whorl was controller of Pakco and secretary-treasurer of Caletta (Pet. App. A, 4a–5a).

While these maneuvers were taking place, Colasurdo was also taking steps to buy two blocks of stock of Crescent, which would give him control of that company. He organized ALCA Industries, a corporation, and made a deal for the purchase of one block of Crescent stock for $6,546,000, to be paid for in three equal annual installments in June of 1965, 1966, and 1967. He financed the initial payment by having ALCA borrow $218,200 from Pakco and the balance by a bank loan, secured by his personal guaranty, by ALCA stock, and by the stock to be acquired from Crescent. At the same time, co-defendant Bronsen, vice-president of Pakco, was occupied in the formation of a corporation, BLCB Industries, and in the arrangement for buying a second block of Crescent stock for $1,875,000. This sum was to be paid on a basis of one-third in June 1965, the same closing date as the ALCA purchase, with the balance to be paid in three equal payments at intervals of six months thereafter. This was financed by a loan of $100,000 from Pakco to Bronsen and a $900,000 loan from another bank, guaranteed by Colasurdo and by the Crescent stock acquired (Pet. App. A, 3a–4a).

[1] Both Caletta and Makepeace were incorporated by the same attorney, co-defendant Finkelstein, who died before trial.

Control of Crescent having thus been acquired, Colasurdo, Bronsen, Whorl, and another nominee were named as four of the seven-member directorate, with Colasurdo as president. On September 15, 1965, Crescent, under its new leadership, agreed to buy the 2,500-acre blueberry tract from Makepeace for $4,000,000. This was to be accomplished by a cash payment of $600,000, shares of Crescent stock valued at $1,500,000, and an installment promissory note by Crescent for $1,900,000 with a right of prepayment. On September 23, 1965, the deeds to Caletta and by Caletta to Makepeace were recorded and on September 25 title was transferred to Crescent. Crescent then prepaid the $1,900,000 note to Makepeace, Makepeace paid $500,000 to Caletta, which paid it to Pakco. Makepeace now had a cash balance of $2,000,000, which it transferred to a corporation formed by Bronsen (Delaware and New Jersey Properties, Inc.), which transferred it to ALCA, which paid off its bank loan (Pet. App. A, 5a–6a).

By April 1967, Pakco had acquired all of the Crescent stock of ALCA and Caletta, which it later sold for a profit in excess of $1,600,000. This had been accomplished by the use of Crescent's own money. Since Crescent had made immediate payment of its obligation to Makepeace, Colasurdo was able to pay off ALCA's bank loan, but in the meantime Caletta would have five years before it had to repay Pakco. And since each dummy corporation had made a profit on its sham sales, McLaney and Cipo had both re-

ceived substantial compensation for their participation in the scheme (Pet. App. A, 6a–7a).

Crescent made various reports to the S.E.C. and to the New York Stock Exchange showing acquisition of its stock by ALCA, issuance of stock "in exchange for land, buildings, machinery, and equipment" and acquisition of the "net assets of a land development" company. It did not divulge that it was dealing with an affiliate or the interest of Colasurdo in the land in question or his ownership of ALCA or BLCB (Pet. App. A, 7a–8a). The filing of the false and misleading statements comprised the substantive counts upon which Colasurdo and Whorl were convicted. The concealment of the true nature of the transactions formed the basis of the charge of conspiracy to defraud the S.E.C.

ARGUMENT

1. The trial judge's action in limiting the scope of the conspiracy count by withdrawing certain portions of the charge from the jury's consideration did not deprive petitioners of their right to be tried on charges returned by the grand jury. In *Salinger* v. *United States*, 272 U.S. 542, a case indistinguishable from the present case, it was held that the withdrawal of portions of a charge from the jury did not violate the defendant's right to be tried on an indictment returned by the grand jury, 272 U.S. 548–549. *Ex Parte Bain*, 121 U.S. 1, upon which petitioners rely, was limited to its peculiar facts.[2]

[2] The decision in *Salinger* did not, as petitioners suggest, turn on the defendant's consent to the judge's action.

The withdrawal of portions of the conspiracy count in the present case, as the court of appeals held, was not prejudicial, "since the elimination of the supporting allegations of the fraud on creditors and stockholders narrowed, rather than broadened, the reach of the conspiracy count" and "the portion of the manifold scheme ordered stricken was unnecessary to the commission of the basic fraud charge" (Pet. App. A, 10a–11a). The decision is clearly correct and in accord with *Salinger* v. *United States, supra*. See also, *New England Enterprises, Inc.* v. *United States*, 400 F. 2d 58, 62 (C.A. 1), certiorari denied, 393 U.S. 1036; *Overstreet* v. *United States*, 321 F. 2d 459, 461 (C.A. 5), certiorari denied, 376 U.S. 919.[3]

2. Petitioners allege that under *Grunewald* v. *United States*, 353 U.S. 391, the evidence was insufficient to sustain a conviction on the conspiracy charge because there was no *direct* evidence of an agreement to accomplish the objectives of the conspiracy to defraud the S.E.C. The holding in *Grunewald*, as the opinion makes clear, is applicable only where the

[3] There is no real conflict among the circuits. *Stewart* v. *United States*, 12 F.2d 524 (C.A. 9), preceded the decision in *Salinger*, and *Carney* v. *United States*, 163 F.2d 784, 788–790 (C.A. 9), involved a "serious situation" in which one count of an indictment, insufficient as drawn, was amended to state an offense. *Gaither* v. *United States*, 413 F. 2d 1061 (C.A.D.C.), involved an entirely different issue than that present here. The decision, however, recognized that the proscription against formal amendment could be obviated by permitting the prosecutor to prove the facts which the amended indictment would have charged. "Thus * * * there is a variance. And the accepted rule is that a variance does not call for dismissal of the indictment except on a showing of prejudice" (413 F. 2d 1072).

prosecution seeks to rely on acts of concealment, undertaken after the conspiracy's criminal objectives have been fully accomplished, to avoid the bar of the statute of limitations. The holding does not apply to cases in which the acts of concealment are undertaken in furtherance of the central objective of the conspiracy. *Grunewald* v. *United States*, 353 U.S. at 405; *Ingram* v. *United States*, 360 U.S. 672, 679 n. 10. In the instant case, as the court of appeals held, "concealment was the essence of the object of the conspiracy" to defraud the S.E.C. by concealing the sham nature of the transactions which resulted in the takeover of Crescent (Pet. App. A, 14a).

3. Count 26 of the indictment charged petitioner Colasurdo with filing a materially false and misleading report with the S.E.C. in violation of 15 U.S.C. 78ff(a). Petitioner alleges that he did not have any notice that the particular facts he is accused of omitting were material. The fact that the petitioner was called upon to exercise some judgment in determining whether failure to disclose would render the report materially false and misleading does not invalidate his conviction on due process grounds. *United States* v. *Ragen*, 314 U.S. 513, 523–524; *American Communications Assn.* v. *Douds*, 339 U.S. 382; *Boyce Motor Lines* v. *United States*, 342 U.S. 337. Petitioner was not being prosecuted for an honest mistake but for "willfully and knowingly" filing a report which was materially "false or misleading" (15 U.S.C. 78ff (a)). As this Court observed in an analogous case, *United States* v. *Ragen, supra*, "On no construction

can the statutory provisions here become a trap for those who act in good faith. A mind intent upon willful evasion [or deceit] is inconsistent with surprised innocence. * * * And the charge given by the trial court amply instructed the jury that scienter is an essential element of the offense" (314 U.S. at 524). The court of appeals correctly concluded in the present case that that "question is ultimately one of honesty and good faith" and that the evidence was sufficient to sustain the conviction (Pet. App. A, 19a).[4]

4. The court of appeals held that the trial judge did not err in refusing to hold a preliminary hearing to determine whether the grand jury had before it evidence obtained in violation of the attorney-client privilege. The court of appeals noted that two of the three attorneys who testified before the grand jury testified at the trial. Their grand jury testimony, which was made available to defense counsel, disclosed no violation of the attorney-client privilege. While the testimony of the third attorney was not available for review, the court of appeals correctly concluded that even if some privileged testimony had cropped into the proceedings a dismissal of the indictment would not be warranted. *Costello* v. *United States*, 350 U.S. 359, 363; *Lawn* v. *United States*, 355 U.S. 339, 348–350; *United States* v. *Blue*, 384 U.S. 251,

[4] This argument affects only one of the five counts of the indictment upon which Colasurdo was convicted. A decision upsetting his conviction on Count 26 would not affect the two-year prison sentence he received on the conspiracy count which was to run concurrently with the concurrent one-year sentences on each of the four substantive counts.

255. Any other holding, the court observed, would require a trial judge to hold "a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury, with resultant delay" (Pet. App. A, 24a).

Contrary to the petitioners' argument, this rule does not "threaten the attorney-client privilege." Not only may the privilege be invoked at the trial, but the attorney himself is under an independent obligation to assert the privilege or face disciplinary proceedings. Under these circumstances requiring an additional pre-trial hearing for the purpose of examining the evidence before the grand jury would further delay and impede the progress of a criminal trial. The risk of possible abuse does not warrant overruling the decisions of this Court which petitioners acknowledge "can be read to foreclose inquiry as to whether evidence before a grand jury was obtained in violation of a defendant's privilege" (Pet. 27).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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